No. 84-1611

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDERICK LANCASTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether states must afford a post-conviction hearing for insubstantial constitutional claims.

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Appellate Court of Illinois for the First Judicial District insofar as the petitioner's issue does not raise a question of constitutional proportion worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, First District, opinion in *People v. Lancaster*, No. 82-2019 (1st Dist., 1984). A copy of the opinion is included with petitioner's petition. The petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on February 5, 1985.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition. As treated more fully in the argument contained herein, however, petitioner has not shown grounds for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat. 1983, ch. 38, § 122-1:

> Petition in the trial court. Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by

affidavit. Petitioner shall also serve another copy upon the State's Attorney by any of the methods provided in Rule 7 of the Supreme Court. The clerk shall docket the petition for consideration by the court pursuant to Section 122-2.1 upon his receipt thereof and bring the same promptly to the attention of the court. No proceedings under this Article shall be commenced more than 10 years after rendition of final judgment, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

U.S. Const. amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF FACTS

In 1972 petitioner entered a negotiated guilty plea to murder based on his fatal shooting of a Chicago police officer who came upon petitioner while the latter was committing a felony. In accord with the terms of the plea agreement, defendant was sentenced to an indeterminate term of 20 to 40 years.

Ten years later, after unsuccessfully seeking executive clemency, petitioner sought collateral relief pursuant to the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.*

1983, ch. 38, § 122-1 *et seq.* Petitioner alleged as his basis for relief that prior to entering his guilty plea, he had told his attorney that he was suffering from a serious kidney ailment. Because his attorney failed to advise the court of his condition, petitioner contended, he was deprived of the possibility of winning a more lenient sentence. Petitioner's trial counsel submitted an affidavit stating he had no recollection whether petitioner had in fact told him about the kidney ailment. The trial court denied defendant's petition without an evidentiary hearing.

On review, the Illinois Appellate Court for the First Judicial District ruled, *inter alia*, that petitioner's ineffectiveness of counsel claim was properly dismissed because 1) the fact that the sentencing hearing might not have contained exhaustive evidence upon which the court could have exercised its sentencing discretion did not pose a question of constitutional proportion; and 2) there was not a reasonable probability that the sentence would have been less if petitioner's condition had been known, especially in light of the grievous nature of his offense. In fact, the Illinois appellate court characterized the information regarding petitioner's physical condition as non-material. Petitioner apparently rested his allegation that he might have received a lesser sentence on the circumstance that he now must travel three times a week to a Chicago medical facility for dialysis treatments. Yet at the time of his sentencing, petitioner's kidneys were still functional; dialysis was not required until two years after the guilty plea. The appellate court, therefore, affirmed the trial court's ruling that petitioner's claim did not merit an evidentiary hearing, since there was no basis upon which petitioner's sentence might have been affected by the fact that the trial court was not apprised of petitioner's condition.

The Illinois Supreme Court denied petitioner's petition for leave to appeal.

REASON FOR DENYING THE WRIT

STATES ENJOY THE RIGHT TO SHAPE THE SCOPE OF REVIEW IN ANY COLLATERAL PROCEEDINGS THEY DEVISE AS LONG AS EQUAL PROTECTION AND DUE PROCESS PRINCIPLES ARE NOT VIOLATED.

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decision below. The constitutionality of trial courts' exercise of discretion pursuant to the Illinois Post-Conviction Hearing Act, *Ill. Rev. Stat.* 1983, ch. 38, § 122-1 *et seq.* ("Act") was correctly decided by the Appellate Court of Illinois and does not present the kind of novel or pressing issue worthy of review by this Court.

Petitioner asserts that a claim of ineffectiveness of counsel at sentencing should be cognizable in a post-conviction proceeding. Petitioner's assertion is governed by the principle that states are free to shape the scope of their collateral proceedings, and hence, are free to determine what kind of claims are substantial enough to warrant collateral review.

The United States Supreme Court ruled that appellate review is not a necessary element of the Fourteenth Amendment's due process clause in the seminal case *McKane v. Durston*, 153 U.S. 684, 915 (1894). In *McKane*, the court observed that states are accorded total discretion in affording review of final judgment in criminal cases, and that states may structure the terms of that review as they deem proper. *Id.* More recently, this principle was reaffirmed in *Griffin v. People of the State of Illinois*, 351 U.S. 12, 18 (1956), wherein the Court noted that although the Constitution does not mandate appellate review on the state level, once provided, that review can

be freely shaped or delimited so long as equal protection and due process principles are not offended. 351 U.S. at 21 (Frankfurter, J., concurring). *See also Jones v. Barnes*, ____ U.S. ____, 103 S.Ct. 3308, 3312 (1983) (no constitutional right to an appeal); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (due process clause of Fifth Amendment establishes no right to collateral attack of final judgment). These cases clearly establish that petitioner had no inherent liberty or property interest in obtaining post-conviction review.

The Illinois Act provides, in pertinent part, that an imprisoned individual who asserts the "substantial denial" of his rights in the proceedings that resulted in his conviction may institute a proceeding under the Act. *Ill. Rev. Stat.* 1983, ch. 38, § 122-1. *People v. Logan*, 39 Ill. App. 3d 656, 657, 350 N.E.2d 40, 41 (4th Dist. 1976) (relief granted under post-conviction act only for substantial constitutional error). If the post-conviction court determines the claim is patently without merit, however, the petition is dismissed. *Ill. Rev. Stat.* 1983, ch. 38, § 122-2.1(a).

Respondent does not quarrel with petitioner's assertion that he has the right to effective assistance of counsel at the sentencing stage of his trial. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). In accordance with the aforestated constitutional principles, however, the State of Illinois has the absolute right to dismiss without a hearing claims of ineffectiveness of counsel that are patently insubstantial.[1]

[1] While petitioner relies entirely on his meritless due process claim, respondent notes that he cannot raise a viable equal protection challenge either. Equal protection violations in the context of collateral proceedings generally refer not to substantive limits on the scope of review, but rather, to the structuring of collateral proceedings such that defendants are effectively denied equal access to review. *See Evitts v. Lucey*, ____ U.S. ____, 105 S.Ct. 830,

(Footnote continued on following page)

Petitioner's claim, measured against the standard set out in *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052, 2064 (1984), is clearly insubstantial. Petitioner's claim would not have established either the deficiency or the prejudice prong of the *Strickland* test, given the Illinois appellate court's finding that petitioner's physical state at the time of sentencing would not have effectuated a reduction in his sentence. Illinois law comports with the *Strickland* standard which calls for a showing of reasonable probability that but for the cited error, the result of the proceeding would have been different. *Strickland*, 104 S.Ct. at 2068; *accord People v. Placek*, 43 Ill. App. 3d 818, 822, 357 N.E.2d 660, 663-664 (2d Dist. 1976) (requires showing that sentence would have been less). Moreover, the post-conviction court did not categorically refuse to entertain petitioner's claim, as he suggests. Rather, the court entertained the claim and then dismissed it as unworthy of further review.

Regardless, Illinois has the right to limit the scope of cognizable ineffectiveness of counsel claims to substantial constitutional questions or even to forego affording collateral review altogether. *Griffin, supra* at 5-6. *See also Kelsey v. Fitzgerald*, 574 F.2d 443 (8th Cir. 1978) (no right to post-conviction remedy). The trial court's dismissal in the case at bar and the substantiality policy are especially rational in light of the inordinate number of ineffectiveness claims that are filed in post-conviction proceedings. *Gray v. United States*, 299 F.2d 467, 468 (D.C. Cir. 1962); *see*

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[1] *continued*
841 (1985). Such violations include failure to provide transcripts to indigents, *Griffin*, 351 U.S. at 17-18; and denial of benefit of counsel to indigents on appeal. *Douglas v. People of State of California*, 372 U.S. 353, 356 (1963). Equal protection certainly does not require that a state cannot, as Illinois does, differentiate between substantial and insubstantial claims.

generally L. Yackle, *Post Conviction Remedies* § 64 (1981 & Supp. 1985). Furthermore, undue encouragement of insubstantial ineffectiveness claims runs counter to the Sixth Amendment notion of opposing, independent adversaries undiluted by endless judicial review. Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. Chi. L. Rev. 1380, 1408 (1983).

In any event, the state need not justify its decision to shape its scope of collateral review the way it has. *Griffin*, 351 U.S. at 18. The decision below was, therefore, decided correctly and in accord with prevailing constitutional principles. Petitioner's claim is thus unworthy of review by this Court and his petition should be denied.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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